1991

# Reed v. Forrer : Brief of Appellant

Utah Supreme Court


George E. Mangan, James R. Hall; attorneys for appellants.
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IN THE SUPREME COURT OF THE STATE OF UTAH





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| Plaintiff | |
| -vs- | Case No. 14572 |
| STUART REED, RUSSELL REED, DONALD REED, FRANKLIN REED, MARGARET REED CORDIE MAE REED and LAWANNA KAY REED, | |
| Defendants and Counter-Plaintiffs | |
| -vs- | |
| HENRY H. FORRER, ROBERT SATHER, EZILDA HENDRICKS, CHARLES HENDRICKS) ROGER L. ROBERSON and ETHEL LaVERNIA ROBERSON, | |
| Counter-Defendants and Appellants. | |

# APPELLANTS' BRIEF

Appeal from Judgment of the Fourth District Court
Uintah County, State of Utah
The Honorable George E. Baillif, Judge

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-vs-

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APPELLANTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

The plaintiff brought an action in the lower court to determine the validity of a mortgage in favor of the defendants and to quiet title in and to the following described real property in Uintah County, State of Utah, to-wit:

TOWNSHIP 2 NORTH, RANGE 1 WEST, UINTAH SPECIAL MERIDIAN

Section 35: The East half of the Southeast quarter of the Northwest quarter; the West half of the Southwest quarter of the Northeast quarter;

(hereinafter referred to as subject property).

The defendants initially answered by asserting the validity of their mortgage and thereafter counterclaimed in the alternative for the foreclosure of their mortgage, or for the court

to determine that they were the rightful owners of said property. The defendants also cross-claimed against other persons who were made parties to the action.

## DISPOSITION IN LOWER COURT

The lower court decreed that the plaintiff was the legal owner of the subject property, but that the property was subject to a valid mortgage in favor of the defendants in the amount of $15,750.00. Defendants were granted a judgment against Ezilda Van Hendricks and Charles Hendricks, counter-defendants, for $15,750.00, plus $25.60 in court costs and interest at the rate of eight (8%) percent per annum from the date of entry of judgment until paid, together with a decree of foreclosure of the defendants' mortgage, thereby selling the subject property to satisfy the indebtedness of the Hendricks to the defendants. The court also entered the default of the defendants, Stuart Reed, Russell Reed, and Donald Reed, who did not appear in the matter, to answer plaintiff's complaint.

## RELIEF SOUGHT ON APPEAL

The plaintiff, Henry Forrer, and counter-defendants, Robert Sather, Roger Roberson and Ethel LaVerna Roberson, desire this court to reverse the decision of the trial court, granting the defendants a decree of foreclosure against the subject property, and to decree that by operation of law, the subject property is free and clear of the mortgage to the defendants in the sum of $15,750.00.

## STATEMENT OF FACTS

The PRE-TRIAL STIPULATION of the parties, which stipulation is pages 95 through 100 of the transcript, contains a concise statement of all the relevant facts as they existed prior to the submission of the matter to the court. This court is faced with the determination of whether the lower court made the correct application of the law to the stipulated facts.

## ARGUMENT

### POINT I

THE DEFENDANTS' MORTGAGE ON THE PROPERTY IN QUESTION WAS NEVER A VALID LIEN.

While the pretrial order asserts that the mortgage is a valid lien, the court, nevertheless, has to consider the legal effects of the mortgage instrument that is in question. It is settled law that a person cannot give a valid mortgage to property that is not legally his. By examining the exhibit entitled, "Deed to Restricted Indian Land", it is to be noted that said deed is from Lily Reed Wash and Chalmers Wash for the land in question, to the "United States of America in Trust for Ezilda Reed Hendricks, an allotted Uintah Ute." The fact is, that said deed was not recorded in the records of Uintah County, and therefore, any alleged interest of Ezilda Reed Hendricks could not be of record. Said restricted deed was given on the 4th of January, 1954. The patent in and to the property in question was not issued by the United States Government until October, 1959, which patent was not recorded until October 18, 1966. Thus, when Ezilda Van Hendricks and Charles A. Hendricks issued a mortgage

to the defendants, namely, on December 19, 1956, they had nothing to mortgage. There was no chain of title in and to the property in question in the records of Uintah County in the name of either Charles A. Hendricks or Ezilda Van Hendricks and in fact, the only evidence of title in either of them was an unrecorded deed to restricted Indian land wherein the United States of America held title to said property as Trustee for Ezilda Reed Hendricks. Apparently, on December 19, 1956, Ezilda Reed Hendricks was a ward of the United States Government as were all other enrolled members of the Ute Tribe. But in any event, the fact is, there was no property in the name of Ezilda Hendricks, nor did she have legal title to this property, and therefore, she could not mortgage the same to her children, the defendants. It would thus reasonably appear that the recording of the mortgage from Ezilda Van Hendricks and Charles Hendricks to the defendants herein should be considered the same as a "stray" deed or mortgage. Title 57-1-6, Utah Code Annotated, 1953, as amended, requires the recording of instruments in order to impart notice. Since in December, 1957, there was no recorded chain of title of the property from the patentee or the United States Government to Ezilda Van Hendricks, it would be reasonable for the ordinary and prudent person to assume that there was no title in fact, in Ezilda Van Hendricks, and that said mortgage was but a "stray" mortgage. This conclusion seems even the more reasonable since there was no recorded patent or other activity in the office of the county recorder relative to the land in question, except the

mortgage in question, until 1966, when the patent and a warranty deed were recorded.

## POINT II

THE SUBJECT MORTGAGE WAS NOT TIMELY FORECLOSED.

While the Utah courts have apparently not ruled specifically on the question of the effect of the failure of the parties to include a provision in the mortgage relative to the time for repayment, the general rule, as stated in 55 Am. Jur. 2d, Section 364, is as follows:

> If a contract for the purchase and sale of real estate provides for mortgages or specified amounts, but is silent as to the date of maturity, it is then held that the law will imply maturity on demand. (See Keystone Hardward Corp. v. Tague, 246 N.Y. 79, 158 N. E. 27, 53 ALR 610). (Emphasis Added).

It has also been held that where the record fails to disclose when an indebtedness secured by a mortgage was due, it must be assumed that it was due at once or at least within a reasonable time. (See Striker v. Rasch, 57 Wyo. 34, 112 P2d 570, 113 P2d 963, 136 ALR 770). In a similar manner, this court has held:

> "In view that the contract is silent as to time, the law supplies the ommission by compelling the appellants to act within a reasonable time. What constitutes a reasonable time would ordinarily be a question of fact under all of the circumstances." (Cummings v. Nielson, 42 Utah 157, 129 P. 619, 622).

This court reiterated that principle in Christensen v. Christensen, 9 Utah 2d 102, 339 P2d 101, 1959. In that case, the court stated:

> "No date was set for payment by the express terms of the contract and although in cases of this kind, the time of payment necessarily is implied and calls for performance within the reasonable time, under familiar equitable principles . . . " (Pg. 104)

The court then cited the case of Frailey v. McGarry, 1949, 116 Utah 504, 211 P.2d 840, which situation involved one party giving the other party reasonable notice of the recision of a contract because of fraud. The court held in that case, that a ten month delay after the default or misrepresentation was known, was not reasonable notice.

The trial court was faced with the question of what is a reasonable time within which to foreclose a mortgage that contains no due date and determined that an action commenced seventeen years after the giving of the mortgage which had no due date, and more than three (3) years after the youngest minor had reached her majority, was a reasonable length of time. Appellants believe that said decision was incorrect. By its very nature, the mortgage, if it was valid, is and was due upon demand and should have been paid within a reasonable time after being executed. Appellants can see nothing reasonable about a mortgage which was executed in 1956, being foreclosed in an action which was commenced in 1973. Nevertheless, the question is, what is a reasonable length of time after December, 1956, within which the defendants should have foreclosed their mortgage? Surely, reasonable men should find that more than seventeen (17) years is a reasonable time within which to foreclose the subject

mortgage. Thus, the right to foreclose the defendants' mortgage should be denied for failing to timely foreclose the same.

## POINT III

### THE RIGHT TO ENFORCE OR FORECLOSE THE MORTGAGE IN QUESTION WAS EXTINGUISHED OR BARRED BY THE RUNNING OF THE STATUTES OF LIMITATIONS.

It is undisputed that on March 19, 1958, Ezilda Hendricks was appointed as the guardian of each of her minor children, who appeared, defended and counterclaimed as defendants herein. It is also an undisputed fact that Ezilda Hendricks was never released as the guardian of those children and continued, therefore, to serve as their guardian until such time as they reached their majority. The appointment of Ezilda Hendricks, who is both their mother and one of the mortgagors of the subject property, as the guardian of the defendants, had a legal effect that was apparently overlooked by the trial court, namely, that the Statute of Limitations commenced running against the minor children as to any rights to foreclose their mortgage, by reason of the appointment of said guardian.

In Jenkins v. Jensen, 24 U. 108, 66 P. 773, this court held:

> "The general rule is that when a trustee is barred by the Statute of Limitations, the cestqui que trust is likewise barred, even though an infant (Hill, Trustees, 267, 403, 504), and that the heir or devisee is dependent upon the diligence of the executor for the maintenance of his rights with respect to the real property but is not without remedy by an action for damages against his executor and his sureties or by a proper proceeding to compel him to bring suit ... Where the administrator in this state neglects to bring an action to recover property of the estate until it is barred under the Statute of Limitations applicable to the subject, the heir

> is also barred even though the heir be a minor at the time the action accrues to the administrator. (At page 777). (Emphasis added)
>
> "The administrator or trustee having the right to commence suit for the recovery of the property within the time limited by the statute and having omitted to do so, he is barred from commencing such action against the respondents who are strangers to the estate and the beneficiary is also barred and his only remedy, if any, would be against the administrator and his sureties." (At page 779) (Emphasis added).

That rule of law was also followed by this court in the case of Dignan et al. v. Nelson et al. 26 Utah 186, 72 P. 936, at which time the court reiterated its decision in the Jenkins v. Jensen and concluded by saying:

> "We perceive no good reason to depart from the doctrine of that case and must, therefore, regard it as controlling authority on this point herein, not withstanding the argument of counsel for the appellants against its correctness. In this case the plaintiff, Emma McGuile, was not only the administrator of the testate's estate, but was also the guardian of the minor heirs, and hence, she as their representative and trustee being barred as we have seen, such heirs are likewise barred." (Page 938) (Emphasis added)

In 1962, this court reiterated the doctrine of the Jenkins v. Jensen and the Dignan v. Nelson cases, when it held:

> "The guardian had possession or the right to the possession of their property for more than the required seven years. In Dignan v. nelson, this court held that where the Statutes of Limitations has run against a guardian, the minor heirs are likewise barred, just as we have held that when the administrator is barred, the minor heirs of the decedent were barred and for the same reason." (Page 463) (Parr v. Zions First National Bank, 13 Utah 2d 404, 375 P.2d 461) (Emphasis Added)

Thus the law of this state is clear that the Statute of Limitations is not tolled by the disability of being a minor, when in fact those minors have a duly appointed guardian who is charged by the court to marshall and preserve all of the assets of said minors. If for no other reason than the existence of a validly appointed guardian, the defendants' mortgage should not have been allowed to be foreclosed against the subject property If the guardian acted improperly, the redress of the defendants should be against the guardian and her bond or sureties, but should not be against the subject property. To allow such a foreclosure would be in derogation of the Statute of Limitations as the same have uniformly been applied by this court in all other cases.

While the natural tendency for all of us might be to not expect a child to pursue claims against his or her parent, or a parent to sue him or herself for misconduct, nevertheless, in this fact situation, it should be the case and the defendants had no trouble naming their mother as a counter-defendant in their counterclaim herein. It should not be forgotten that it was Ezilda Reed Hendricks who voluntarily solicited and accepted the responsibility to serve as the guardian of her children. Her appointment to so serve must be subject to all the legal ramifications that any other appointment would be subject to. Her failure to commence legal action against herself to foreclose the mortgage did not preclude those children from commencing an action against their mother for failing to marshall and preserve their assets as each reached their majority. The Statute of

Limitations did not commence to run against the individual minor as to their right to commence an action against their guardian, in this case their mother, until three years next after the termination of the guardianship. (See 78-12-18 Utah Code Annotated). Under the doctrine established in the Jenkins v. Jensen case, (supra) this court distinctly stated that the individual minor had the right to commence an action against his or her guardian in the event of the failure of that guardian to protect the rights of the minor during his or her incapacity. It is thus clear that the running of the Statute of Limitations against an individual minor, when the minor has a duly appointed and constituted guardian to represent its interest, is not "tolled" in this state.

If these minors had not in fact had a guardian, then we would be faced with an entirely different fact situation and the running of the Statute of Limitations would have been argued from an entirely different point of view. As mentioned above, any action by a minor, even against his guardian, for the recovery of any property that the guardian may have disposed of improperly, must be commenced within three years of the date of the termination of the guardianship.

Title 75-13-14 of the Utah Code Annotated provides how the termination of guardianship is brought about. Provisions of that section are as follows:

> "The power of a guardian of a minor shall be terminated: First, by order of the court; Second, by the wards obtaining majority; Third, by the marriage of the ward; provided, that the guardianship of the estate of the ward may be continued at the discretion of the court after

> the guardianship of his person has been terminated by marriage, and until he reached the age of majority." (Emphasis added)

Inasmuch as Ezilda Hendricks did not terminate the guardianship by court action, it would thus seem that the second provision of Title 75-13-14 would apply, namely, that the guardianship was terminated by the ward obtaining his or her majority. By stipulation it is agreed that the youngest of the Reed children reached their majority on June 15, 1970. Under the provisions of the code, a minor has three years after reaching his majority within which to commence an action to recover any estate sold by the guardian. If no action is commenced, then the minor is barred.

The plaintiff commenced this action in February of 1973. On February 26, 1973, the defendants' attorney, Parker M. Nelson, answered plaintiff's complaint by denying the material allegations of the same and alleging simply that the mortgage was valid. There is nothing in the Statutes of the state of Utah nor in any of the decisions of this court that appellants have been able to find, which would construe that an answer of a defendant to be the same as the commencement of an action. In fact, Rule 3 of the Utah Rules of Civil Procedure indicates that an action may be commenced in one of two ways: 1. By filing a complaint with the court; or 2. By the service of a summons. The defendants did neither of these. However, the filing of a compulsory counterclaim could be construed to be a commencement of an action, especially in the light of this particular lawsuit. The defendants were required to file their counterclaim or be forever

barred (See Rule 13 URCP). The defendants did not even attempt to file a counterclaim herein until on or about the 19th day of March, 1974, which was immediately prior to the first scheduled trial in this matter on March 27, 1974. Only after that date did the court grant the defendants leave to file their counterclaim. The youngest defendant reached her majority in June, 1970, and thus the Statute of Limitations as to her claims expired no later than June, 1973. Thus, by March, 1974, the fact is that the claim upon which that counterclaim was based was then barred by the Statute of Limitations. The plaintiff-appellants did properly assert that defense in their answer to defendants' counterclaim. The plaintiff-appellants thus conclude that in March, 1974, when the defendants filed their counterclaim, the defendants' right to enforce or foreclose their mortgage was extinguished by the running of another provision of the Statute of Limitations. The lower court apparently discarded all claims by the plaintiff-appellants to the use of the Statute of Limitations as a bar to the foreclosure of the subject property. This is difficult to understand. This court has specifically held that a junior mortgagee or grantee may invoke the protections of the Statute of Limitations relative to 78-12-23, which is the applicable section herein, when the Statute of Limitations has run against the prior grantee or mortgagee (See Krompton v. Jensen 78 U. 55, 65, 1 P.2d 242; Boucofski v. Jacobson, 36 Utah 165, 104 P. 117 and Graves v. Seifried, 31 Utah 203, 87 P. 674). In the Boucofski v. Jacobson (supra), this court held as follows:

> "That the bar of the Statute may be invoked by the subsequent grantee or junior lien claimant in all cases when the bar could be invoked by the debtor unless the subsequent grantee has by agreement or otherwise estopped himself; that such grantee or claimant may also envoke the bar in case the senior claimant has had either actual or constructive notice of the subsequent grant or lien while the right of action may still be alive as against the debtor, provided the full period of time required by the Statute has elapsed since the interest of the subsequent grantee or lien holder was acquired and the senior claimant has either actual or constructive notice of such interest for that period of time; that in case such interest be acquired before the original debt matured, the statute in favor of the junior claimant begins to run from the time the right of action against the original debtor accrued. (Page 122) (Emphasis added).
>
> ". . . If the right of action has thus accrued against the debtor, the action must be commenced within the six years from the time such interest was acquired if the prior claimant had notice of it or within six years after such notice is acquired and if not so commenced, the subsequent claimant may invoke the bar of the Statute to the full extent of that interest; and, if he has acquired the equity of redemption from the original mortgagor, or in some other way has succeeded to the title, he may protect this title." (Pages 123-124) (Emphasis added)
>
> "Appellants therefore have the full statutory period namely six years, from the time the cause of action accrued, within which to commence an action to foreclose the mortgage, and if not within that time, the mortgage would have been the senior lien . . . by neglecting to institute suit, appellants took the chances that the interest, although only a lien when acquired, may nevertheless ripen into a complete title and thus constitute a bar against them, not only so as to postpone their claim, but to prevent its enforcement against the property at all." (Page 124)

The Boucofski case dealt with a party having a tax title to the property in question, which tax title the court held became paramount and superior to a mortgage of record at the time the tax title was acquired. The law announced in the Boucofski case is still good law and it fits on all fours with the facts of this

case, namely, that the court found that those who acquired a subsequent interest or title to the land would be able to use the defense of the running of the Statute of Limitations to bar the enforcement and foreclosure of a mortgage existing when they secured their title to the same.

In Graves v. Seifried, (supra) this court reached a decision similar to that in the Boucofski case when it quoted approvingly from a decision in California as follows:

> "'But it is a settled doctrine of this court, as will be seen from the authorities above cited, that when third persons have subsequently acquired interest in the property, they may invoke the aide of the statute as against the mortgagee even though the mortgagor, as between himself and the mortgagee, may have waived this protection; and we see no difference in the principal between a suspension of the running of the statute resulting from an express waiver, and one caused by his voluntary act in absenting himself from the state'. Under a review of the cases, the court further observes: 'The theory of all the cases above cited is, that while the general rule is that a plea of the statute of limitations is a personal privilege, the rule does not extend to subsequent property owners over which he has no control.' Brandstein v. Johnson, 140 Cal. 229, 73 Pac. 744."

A similar result was reached in the case of Bracklein v. Realty Ins. Co., 95 U. 490, 80 P.2d 471, where the court held that even the purchaser of the mortgaged premises who assumed and agreed to pay the mortgage, could assert the running of the Statute of Limitations as a defense to a mortgage foreclosure. These decisions, while old, are still the case law in the state of Utah and no contrary decisions are to be found.

The plaintiff-appellants urge that this court hold that the Statute of Limitations is a bar to the enforcement and fore-

closure of defendants' mortgage against the subject property, thereby decreeing the same to be unenforceable, barred and extinguished.

## POINT IV

### THE INTEREST OF EACH OF THE DEFENDANTS IN AND TO THE MORTGAGE SHOULD HAVE BEEN SEVERED OR SEVERABLE.

At the time of the trial, the trial court correctly entered the defaults of three of the defendants, namely, Stuart Reed, Russell Reed and Donald Reed, each of whom had failed to appear or answer plaintiff's complaint. The legal effect of said default would be to serve as a bar to any recovery by said defendants, or to extinguish their rights to the mortgage in question. A casual examination of the mortgage in question indicates that each of the defendants, both those appearing and those not appearing, had made separate contributions to the alleged mortgage. There is nothing in the record to indicate that the alleged mortgage could not have been foreclosed as to each of the defendants as each of them reached their majority. In fact, since a specific amount is specified as to each of the defendants, then each of the defendants should have been entitled to foreclose the mortgage for that amount and for no more. As discussed above, the mortgage was due on demand. Under the provisions of Titles 78-12-18 and 75-13-14, U.C.A., the interest of the individual defendants, not only in this mortgage, but in any other matter, would have been subject to the running of the Statute of Limitations as each of the defendants reached their majority. Surely, the separate contributions of each defendant to the

mortgage principal was severable from the contributions of the other defendants. In Baker v. Goodman, 57 Utah 349, 194 P. 117, this court held that in an adverse possession action, where there was no guardian for the minors involved, that the Statute of Limitations had run against those minors who had reached their majority, but had not run as to those who had not reached their majority. This court thus acknowledged the severability of the claims of minors, as they reach their majority.

As the guardian of the estates of the defendants when they were minors, Ezilda Hendricks had no responsibility to marshall the assets of one minor for the benefit of another minor. Her only duty was to marshall the assets of each of the minor defendants for their private and personal benefit. Each of the individual defendants made a contribution to the consideration received for the mortgage and each of them at one time had a right to the recovery of that consideration. However, surely the older defendants are not to be allowed, by any stretch of the imagination or implication of law, to "toll" the running of the Statute of Limitations as to them, until the youngest of their brothers and sisters became of age. Any disability that the law may have given the defendants as minors was removed by the appointment of a guardian for said defendants. Their guardian had the affirmative duty to foreclose said mortgage within six years after the mortgage was reasonably due. Since their guardian failed to foreclose said mortgage within the time allowed, the defendants are now barred under the ruling in Jenkins v. Jensen, Dignan v. Nelson and Parr v. Zions First National Bank (supra)

from any right of foreclosure herein, whether severable or joint.

Furthermore, the trial court, by granting the defendants a foreclosure of the entire amount of the original mortgage, in effect set aside the default of the three defendants who did not appear, nor file a counterclaim for foreclosure, because there was no way the sum due on the mortgage could be $15,750.00, without including the contributions of the three defaulted and non-counterclaiming defendants. The three defendants who did not appear, were deemed, by law to have admitted plaintiff's complaint. Legally, therefore, the mortgage, with a specified amount of contribution from each of them, must have been satisfied as to the non-appearing defendants, suggesting again the severability of the mortgage as between each of the defendants. Had the mortgage in question only specified a lump sum due, without specifying the contributions of any of the defendants, we might have a different conclusion to reach relative to severability of the mortgage and the amounts due thereunder the defendants. However, because: (1) There was a specified contribution as to each of the defendants; (2) This court held in Baker v. Goodman (supra) that the Statute of Limitations is not "tolled" for the older brothers and sisters until the youngest child reaches his or her majority; (3) More than a reasonable time (seventeen years) to foreclose the mortgage had run; (4) The defendants, while under the disability of being minors had a duly constituted and appointed guardian who was charged with marshalling all assets of the minors; and (5) The Statute of Limitations does run against minors who have a duly constituted and appointed guardian,

the plaintiff-appellants would urge but one conclusion, namely, that the mortgage was severable as between the individual defendants, as well as being barred by the Statute of Limitations.

## CONCLUSION

Based upon the foregoing arguments, the plaintiff-appellants would urge this court to reverse the decision of the lower court granting the foreclosure of the defendants' mortgage against the subject property, the same being unenforceable and barred by the Statute of Limitations, or in the alternative, and in the event the foregoing should fail, to reverse the lower court, and to reduce the judgment of foreclosure by the amount contributed by the three defendants who were in default, together with any and all other defendants this court finds who were barred, by operation of law from enforcing their portion of the mortgage.

Respectfully submitted,

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